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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 657

J. L. WALKER, *Appellant*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES INC., and W. W. CALLAN, *Appellees*

On Appeal from the United States District Court for the Western District of Texas San Antonio Division

MOTION TO AFFIRM

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INDEX

	Page
Statement	1
Argument	4
Conclusion	14

CITATIONS

Cases:

Canadian Pacific Railway Company v. *United States*, 158 F.Supp. 248 (D. Minn., 1958)	6
Central Freight Lines Inc., Note, 90 M.C.C. 246 (1962)	3
Central Pacific Ry. Co:—Control, 76 I.C.C. 508 (1923)	13
Claiborne-Annapolis Ferry Co. v. *United States*, 285 U.S. 382 (1932)	8
Cleveland, C.C. & St. L.R. Co. v. *United States*, 275 U.S. 404 (1928)	8
Evanston Fireproof Warehouse—Control—Allied Van Lines, 40 M.C.C. 557 (1946)	13
McLean Trucking Co. v. *United States*, 321 U.S. 67 (1944)	6
Missouri Pac. R. Co. v. *United States*, 4 F. Supp. 449 (E. D. Ky., 1933), aff'd. 293 U.S. 524	7, 8
New York Central S. Corp. v. *United States*, 287 U.S. 12 (1932)	6
Pittsburgh and W. Va. R. Co. v. *United States*, 281 U.S. 479 (1930)	8
Simpson v. *South Western Railroad Company*, 231 F. 2d 59 (5th Cir., 1956), cert. denied, 352 U.S. 828	12
St. Joe Paper Co. v. *Atlantic C.L.R. Co.*, 347 U.S. 298 (1954)	9
United States v. *Southern Pacific Co.*, 259 U.S. 214 (1922)	13
Walker v. *United States*, 204 F. Supp. 918 (W. D. Tex., 1961)	3
Walker v. *United States*, 208 F. Supp. 388 (1962)	4
Wiley, O. C., & Sons v. *United States*, 85 F. Supp. 542 (W. D. Va., 1949), aff'd. 338 U.S. 902	6

filed a formal pleading seeking the outright dismissal of the 'new' application. He was not denied the right to participate in it. Indeed, he seemed to regard it with disdain." (208 F. Supp. at 839-840.)

As the court properly observed, the Commission's jurisdiction "over carrier issuance of securities is "exclusive and plenary." The governing statute, 49 U.S.C. § 20a, par. (7), reads as follows:

"The jurisdiction conferred upon the commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein."

Discussing fully that "exclusive and plenary" jurisdiction and referring to court and Commission cases dealing with Commission authority over issuance of carrier securities, the court concluded (208 F. Supp. at 391):

"Reading all of these Commission reports, including the two latest ones in the Walker-Central series, together, practically all of the points urged so vigorously by Walker now wash out."

It is eminently clear that the Commission has only authorized, permissively and as consistent with the public interest the transaction presented, including issuance of the contemplated notes. The court below has found that this action of the Commission is in conformity with law. Nothing more is involved. Appellant fails to show wherein the controlling statute has been violated. Thus there are no substantive issues raised by appellant and the case does not warrant the consideration of this Court.

[illegible] Corporation Fire-proof Warehouse Co., 40 M.C.C. 557 (1946), the Interstate Commerce Commission, relying upon its "exclusive and plenary" authority under Section 5(11) of the Act (49 U.S.C. 11) approved the control in spite of the fact that a court decree had issued purporting to determine rights of the very parties then litigating those rights before the Commission. See 40 M.C.C. 557 at 560-567; Central Pacific Ry. Co. Control, 76 I.C.C. 508 (1923); United States v. Southern Pacific Co., 259 U.S. 214 (1922).

of approval in the January order. The final approval, at 90 M.C.C. 240, authorizes Central to give Walker directly everything he bargained for in his contract and renders moot the challenge to validity of the order of June 4, 1959. Walker's consent to the latter order is not necessary; moreover, it does not purport to direct any action on his part.

It is urged that the Commission, in view of the pendency of the proceeding in the court below, was without authority to enter its order authorizing Central to issue an additional $150,000 in promissory notes (1, S. 3, 21-24).

On this point the court below said:

"* * * it is plain * * * that three things were contemplated. First, it was recognized that the Commission had to hold further proceedings. * * * Second, we recognized that its action might be in several papers as we referred to 'the supplemental orders or reports' which the Commission would issue. Third, and of more importance, we expressly required that 'the Commission indicate with appropriate required specifications its findings, reasons and conclusions with respect to the total amount of promissory notes payable to Walker * * * which Central is authorized under § 214 to issue.' 204 F. Supp. 921. We italicize the word 'is' to emphasize that we were seeking current, contemporary determination by the Commission. We were not concerned merely with previous determinations." (208 F. Supp. at 392)

The court added:

"* * * Walker's contention that this supplemental order is invalid because wholly in camera' is unfounded. Walker had notice of the application and

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[1] So to argue is to attack collaterally what appellant failed to attack directly. The assailed order is permissive, and such an order may not be attacked collaterally. Simpson v. South Western Railroad Company, 231 F. 2d 59 (5th Cir. 1956), cert. denied, 352 U.S. 828.

Callan petition, and fully consistent with the broad results
order of January 22, in accordance with the (Central-
stitute a workable condition for one unworkable in the
What the order of June 4, 1959, did was merely to sub-

the Commission is authorized to modify its orders and "to
Further, by Section 204(a)(6) [49 U.S.C. § 304(a)(6)],
make all necessary orders."

it may deem necessary or appropriate."
order made under paragraph (1), (2) or (7), as
cause shown, make such orders, supplemental to any
"The Commission may from time to time, for good

under Section 5(9) of the Act [49 U.S.C. § 5(9)]:

tions, so found to be just and reasonable." Moreover,
"upon the terms and conditions, and with the modifica-
merce Act [49 U.S.C. § 5(2)(b)] which authorize orders
provisions of Section 5(2)(b) of the Interstate Com-
to petition of appellees (Central and Callan and under
is invalid falls of its *own weight*. It was issued pursuant
Argument that the Commission's order of June 4, 1959,

or modified terms. * * *"
interest, it will approve acquisition on the proposed
whether, on the statutory standards relating to public
enforce a contract. Its responsibility is to determine
sion's responsibility is not that of a court sitting to
carrier being acquired is not a party. The Commis-
party who proposes to acquire. § 5(2)(a). The
1959. As to a proposed acquisition, the applicant is the
Found Co., Finance Docket No. 20763, December 4,
Paper Co. v. Atlantic Coast Line R. Co., 1954, 347
U.S. 295, 74 S.Ct. 574, 98 L. Ed. 710; cf. Louisville
& Nashville R. Co. et al.—Control—Interstate Rail-
existence of power, does it make the grant of that
approval erroneous. This is not a merger as such.
Hence, the unique limitations as to a mutually ac-
ceptable voluntary merger do not apply. See, e.g.,
as between Central and Callan. Nor, finding the
the modifications and conditions effectually imposed
mission of power to approve the transaction with
enforceability of the 1956 contract deprived the Com-

railroads would, it has been feared, almost certainly be adversely affected. Shippers and communities adequately served by railroad A may suddenly find themselves unfavorably dependent upon railroad B. Investors in one railroad would, contrary to their expectations, find their holdings transmuted into securities of a different railroad. * * *" (347 U.S. at 306).

It will be observed that none of the reasons which the Court noted for Congressional hostility to involuntary mergers apply to acquisitions of control. Thus, it is fair to say that the legislative history underlying Section 5 indicates a deliberate intent on the part of Congress to treat acquisitions of control somewhat differently than carrier mergers. In other words, the legislative history fully supports the explicit provisions of the statute which do distinguish between the two situations.

Let there be no confusion. There is nothing involuntary about the transaction involved in the case at bar. Appellant did enter into a contract with Central by which he agreed to sell to Central the controlling stock in Alamo. In reliance upon that contract Central filed its application for authority to consummate the transaction. Appellant now does not like the bargain and seeks to cast itself in the role of an involuntary party. But even a cursory examination of the facts will disclose that this is not the situation.

The ultimate controversy here grows out of and revolves around the contract which Walker voluntarily made with Central. Any obligations that Walker may have grow out of that contract, not from the decision of the Commission. The question presented to the court below was the lawfulness of the action taken by the Commission in approving Central's application to acquire control of Alamo. The court below correctly held (208 F. Supp. at 395):

"Finally, we do not think that the existence of a serious dispute between the parties as to the legal

the Commission seeking its approval. In support of that proposition appellant relies upon the decision of this Court in *St. Joe Paper Co. v. Atlantic C.L.R. Co.*, 347 U.S. 298 (1954); but that decision does not support appellant's position.

Reference to Section 5 (2) (a) of the Act, 49 U.S.C. § 5 (2) (a), will disclose that specific provision is contained therein "for two or more carriers to consolidate or merge their properties or franchises" as well as specific provision for "any carrier * * * to acquire control of another through ownership of its stock." Subsection (b) of Section 5 (2), 49 U.S.C. § 5 (2) (b), then provides that "Whenever a transaction is proposed under subparagraph (a), the carrier or carriers * * * seeking authority therefor shall present an application * * *." There is plainly an explicit statutory distinction between mergers of carriers, on the one hand, and acquisitions of control, on the other. In the first instance the statute contemplates that the carriers party to a merger will together come before the Commission, while in the second instance the statute explicitly provides that the carrier seeking to acquire control of another will file its application for authority.

The *St. Joe Paper* case dealt solely with the merger of two carriers and not with the acquisition-of-control situation. And the holding in the case was only that the Commission is not empowered to compel a merger between carriers. In the course of its decision, the Court reviewed the legislative history underlying Section 5 from which it concluded that Congress had deliberately withheld from the Commission the power of initiating mergers between railroads. And the Court went on to note the reasons for Congressional hostility toward involuntary railroad mergers. It said:

> "The reasons for this hostility to mergers imposed by the Commission derive largely from the disadvantages attributed by Congress to such far-reaching corporate revamplings. Employees of the constituent

that under a series of Supreme Court decisions it was clear that the Commission in cases arising under Section 5 has nothing to do with private rights. The court in the Missouri Pacific case then held:

"• • • These cases establish not only that the Interstate Commerce Commission, in determining whether it will exercise a power conferred or perform a duty imposed upon it, has no power to take into consideration collateral matters, such as private rights, but also that the courts in an attack made upon its order have no power to consider same. The sole question is whether the commission was empowered or required to make the order and had considered the conditions upon which it was empowered and required to make it and determined that they existed. Indeed, the matter can be pushed further. Even if it were conceded that the Texas & Pacific had rights under the Gould-Huntington agreement which the acquisition of control of the Cotton Belt by the Southern Pacific might result in the violation thereof, the commission had power to make the order complained of upon its determination that the public interest called for such acquisition. Louisville & N. R. Co. v. Motley, 219 U.S. 467, 31 S. Ct. 265, 55 L. Ed. 297; 34 I.R.A. (N.S.) 671; Kansas City So. R. Co. v. United States, 231 U.S. 423, 34 S. Ct. 125, 58 L. Ed. 296, 52 I.R.A. (N.S.) 1; New York v. United States, 257 U.S. 591, 42 S. Ct. 239, 66 L. Ed. 385." (Emphasis added.) (4 F. Supp. at 456-457.)

Appellant argues that the Commission's order of June 4, 1959, is invalid because it undertakes to approve a transaction not assented to by appellant. (J. S. 14-18). That is, the appellant contends that under Section 5(2) of the Interstate Commerce Act [49 U.S.C. § 5(2)] the Commission may not consider transactions between two carriers unless both carriers voluntarily come before

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The cases cited by the court for this proposition were Cleveland, C. C. & St. L. R. Co. v. United States, 275 U.S. 464 (1928); Pittsburgh and W. Va. R. Co. v. United States, 281 U.S. 479 (1930); and Chicopee-Agawam Ferry Co. v. United States, 285 U.S. 382 (1932).

Louis Railway Company (known as the Big Four). The Commission granted approval under Section 5 (2) and upon judicial review of that decision the contention was made that under applicable state law the New York Central's charter did not authorize a lease of competing lines of railroad. The Supreme Court held that in reviewing the validity of the Commission's action the question of the right of a state to incorporation in a diferent proceeding to challenge the lease as ultra vires was not before it. The Court went on to say:

> "* * * The order of the Commission under § 5 (2) is permissive, not mandatory. There is no warrant for concluding that the Congress intended to fetter the exercise of the Commission's authority by requiring that the Commission before making its order must determine whether the acquisition is within the corporate powers of the carrier under state laws. The Commission has given its approval in the exercise of the authority conferred and the question of corporate powers cannot properly be raised in this suit to set aside the Commission's order. * * *." (287 U.S. at 26-27)

Certainly if the provisions of state law do not invalidate permissive authority granted by the Commission under Section 5 (2) of the Act, no such effect can be given to matters growing out of private contracts. And this too is well settled in law. In Missouri Pac. R. Co. v. United States, 4 F. Supp. 449 (E. D. Ky., 1933), aff'd. 293 U.S. 524, the Missouri Pacific Railroad and the Texas and Pacific Railway Company challenged an order of the Interstate Commerce Commission authorizing the Southern Pacific Company to acquire control of the St. Louis Southwestern Railway Company (the Cotton Belt) on the ground that the transaction would violate a long standing contract between the Texas and Pacific and the Southern Pacific. The court noted that the Commission had held it was not within the Commission's province to construe the agreement between the railroads or adjudicate the rights of the parties thereto. The court went on to point out

mission to acquire control of Alamo and its affiliates. Being permissive, the order requires nothing. It constitutes no adjudication of private rights, does not purport to state whether the transaction will or should be consummated, and does not bind either buyer or seller to act. It does nothing more than find that if the parties to the original transaction desire to consummate it upon those original terms, with the conditions imposed by the Commission to protect Central against possible overcapitalization, they may do so, and if they do, the acquisition of control will be consistent with the public interest.

Appellant's contentions deal largely with matters of private contractual right. Whether Walker assents to the Commission's order, or now assents to the transaction he entered into as authorized by the Commission, is unimportant at this juncture. As the court below said: "In a broad sort of way this appellant's position therefore is that the Commission may not legally approve the sale which he contracted to make." (208 F. Supp. at 390).

The Commission's authority in cases involving the acquisition of control of one carrier by another under Section 5(2) of the Act (49 U.S.C. § 5) is very broad. McLean Trucking Co. v. United States, 321 U.S. 67 (1944); Canadian Pacific Railway Company v. United States, 158 F. Supp. 248 (D. Minn., 1958); C. C. Wiley & Sons v. United States, 85 F. Supp. 542 (W. D. Va., 1949), aff'd. 338 U. S. 902. In the exercise thereof the Commission is duty-bound to apply the standard of consistency with the public interest and is not required to consider whether one of the parties to a proposed transaction might be unable to consummate the deal because of the law of the state of incorporation. Thus, in New York Central S. Corp. v. United States, 287 U. S. 12 (1932), the New York Central Railroad sought authority to acquire control by lease of the Cleveland, Cincinnati, Chicago & St.

sumed to provisions of the Interstate Commerce Act which provide in pertinent part as follows (49 U.S.C. § 5):

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) * * * for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise * * *.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission * * *. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions and with the modifications, so found to be just and reasonable * * *."

The transaction underlying the decision of the Interstate Commerce Commission was proposed by application of Central joined by Allan, as the person in control of Central, after a contract had been executed between Central and appellant for the purchase by Central of all the stock of Alamo and its two affiliates. It should be carefully observed that appellant Walker was not a party to the application presented to the Commission and clearly was not required to be such under the pertinent statutory provisions just quoted.

Of controlling importance to an appreciation of just what is before this Court is an understanding of the nature of the Commission's action. The Commission has done nothing more than to give Central and Allan per-

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[5] The statute puts no time limit on exercise of the Commission's authority to approve. Thus appellant's argument that approval is invalid because long delayed is without support, especially since litigation instituted by appellant has caused the delay.

according to the 1956 contracts, and without overcapitalization.

The court below, in its second report, *Walker v. United States*, 208 F. Supp. 388 (1962), examining the decisions of the Commission, said:

> "* * * we are able to distill from two simultaneous decisions the following: in addition to the authority to issue promissory notes payable to Walker and Hart in the amount of $750,000 in payment for stock in Express and Carriage * * *, Central is also now formally authorized to issue a note payable to Walker in the sum of $450,000 representing the agreed deferred price for his stock in W & H * * *. Thus, an aggregate of $1,200,000 in promissory notes is now approved." (Id. at 393)

The complaint was then dismissed by the lower court.

ARGUMENT

This Court is requested by appellant to review certain orders by the Interstate Commerce Commission authorizing consummation of the stock purchase by one motor carrier and its controlling stockholder of the stock of another such carrier and two affiliates. The assailed finding of the Commission was that "Consummation of the transaction partly by Central and partly by Callan as assignee from Central would be consistent with the public interest, and the terms and conditions of such transaction would be just and reasonable." (90 M.C.C. 96, at 100)

The basic question in the court below, and as properly seen by that court, was whether Commission approval was in accordance with the statute. This the court affirmatively found.

The burden on appellant here, and in the court below, was to demonstrate that the order of the Commission was clearly erroneous. The decision was reached pur-

of a new contract be entered into between Callan and Walker providing for the direct purchase by Callan of the W & H stock from Walker. In response to a petition by Central and Callan, this condition was removed by Commission order of June 4, 1959 (4 S. 45-49) and therein Callan in the event of consummation was directed, as offered in the petition, to furnish an appropriate bond insuring his financial responsibility under the assignment, and thus protecting Central against the possibility of overcapitalization.

Appellant filed suit in a Texas State court to declare the subject contract void and Central counterclaimed for specific performance. That proceeding is still pending. *A. A. Walker v. Central Freight Lines, Inc., et al.*, Docket No. F-11038-H, 181st Judicial District, Bexar County, Texas.

Subsequently complaint was filed by Walker in the court below, challenging the validity of the approval by the Interstate Commerce Commission. Upon argument, that court remanded the matter to the Commission for clarification and further orders "whether the approval of the § 5 application does or does not constitute appropriate authorization under § 214 for the issuance of the promissory notes to Walker and Hart as applied for in the initial contracts of June 30, 1956." *Walker v. United States*, 174 F. Supp. 204 (W. D. Tex., 1961), 90 M.C.C. 96, at 100, 921. In its supplemental report (90 M.C.C. 96, at 100, February 19, 1962) responsive to the remand, the Commission held that in its earlier report it had approved issuance of notes only to a maximum of $750,000. Meanwhile, Central had filed with the Commission an application for authority to issue a $450,000 note to Walker. This authorization was granted in a separate docket. (*Central Freight Lines Inc., Note*, 90 M.C.C. 216 (1962), simultaneously with the foregoing supplemental report. At this stage Central was fully authorized to perform

by another such carrier and its controlling stockholder is lawful.

The contract to buy, made in 1956, was for the purchase by Central Freight Lines (Central) and W. W. Callan (Callan), Central's controlling stockholder, from appellant Walker and one Hart, of all the stock of Alamo Express, Inc., a carrier (Alamo). Alamo (Cartage Company and W & H Investment Company, the latter being affiliates of Alamo. After hearing and an examiner's report, the Commission denied the application on the ground that to assume the obligation Central would be overcapitalized. 70 M.C.C. 610 (1957). Thereafter, Central assigned to Callan the contract to purchase the stock of W & H Investment Company and, as thus modified, the proposal, after further hearing, was the subject of another examiner's report, and a report of the Commission approving the application, with conditions. 75 M.C.C. 731 (1959).

Aggregate purchase price for all the stock was $2,000,000 of which $1,500,000 was to be evidenced by Central's notes, issuance of which required authorization by the Commission. The assignment, supra, reduced the amount of the notes to be issued by Central from $1,500,000 to $750,000. It provided that Callan would acquire control of W & H, leaving Central to acquire control of Alamo Express and Alamo Cartage for $1,000,000 of which $750,000, the original proposal as to these two, would be evidenced by Central's notes.

In its second report the Commission, in finding the overcapitalization removed and in approving the application, attached a condition (75 M.C.C. at 737) that the assignment to Callan, supra, be cancelled and that in lieu there-

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[1] A supplemental agreement made with the other stockholder, Hart, and approved at 75 M.C.C. 731 as a part of the total transaction, is not here involved.

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, Central Freight Lines Inc. and W. W. Callan move that the judgment of the district court be affirmed.

STATEMENT

This case raises the simple question whether Interstate Commerce Commission approval of authority for purchase of the stock of a motor carrier and its two affiliates

CONCLUSION

These appellees urge that the decision below is clearly correct in upholding the order of the Interstate Commerce Commission. It is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. The judgment of the district court should be affirmed.

Respectfully submitted,

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JANUARY 1963